BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

COMPLAINT OF GARY LEDFORD ON HIGH DESERT POWER PROJECT WATER ISSUES	**DOCKET NO. 97-AFC-1C (C1) COMPLAINT-1**

LEDFORD PETITION FOR REVIEW OF COMMITTEE RULINGS AND DISMISSAL[S]

BACKGROUND

On May 3, 2000, the Energy Commission ("Commission") certified the High Desert Power Project (HDPP) for construction and operation in the City of Victorville. On October 11, 2001, Gary Ledford ("Complainant"), an intervenor in the certification proceeding, filed a Complaint asserting that the HDPP had not complied with specified conditions of certification. On November 9, 2001, the Chairman of the Commission issued a Notice of Complaint. The matter was assigned to the Commission's Sitting Committee. The complaint is founded on the failure of the CEC Compliance Staff to enforce the conditions of certification.

On December 28th 2001, the Committee established a "Preheating Conference" by its Order dated December 28th 2001 The "Conference" was to be held on January 14th, 2002, for specific and limited purposes, none of which was to "cancel the evidentiary hearings and make a determination that "Position Statements" somehow amounted to final a "Briefing" so that the matter could be then deemed submitted by the Parties.

Nonetheless the "Committee", after certain Stipulations were entered into by the Parties, on its own motion made rulings based on "Position Statements", an Answer filed by Respondent, and compliance with the Committee's Order to produce "documents". The "Rulings" and "Dismissals" were bifurcated from the part of the complaint as to the method of water treatment, which the Committee stated, "we find the matter submitted as filed."

The Committee's rulings in advance of a scheduled evidentiary hearing amounts to an abuse of discretion, while there is no formal format for "Position Statements" under the Commissions rules, the outline provided, does not constitute a formal briefing. The rulings, failed to allow respective rebuttal of Parties positions and/or cross-examination of any witnesses.

TITLE 20 SECTION 1215 (b)

> (b) Any party may petition the full commission to review any order prepared pursuant to subsection (a) of this section. Any such petition shall be filed within ten days of the date of the order being issued; provided, however, that rulings of the presiding member or committee may not be appealed during the course of hearings or conferences except in extraordinary circumstances where prompt decision by the commission is necessary to prevent detriment to the public interest. In such instances, the matter shall be referred forthwith by the presiding member to the commission for determination.

Because the committee made bifurcated rulings, the tolling of the statute of limitations for appeal appears to begin to run from the date of the ruling or order. Complainant attempted to enter into a Stipulation with the Committee to consolidate any appeal to the full commission until the Committee's final order on all matters is issued. No response was received to the Complainants request. Complainant reserves the right to amend this appeal upon the final rulings of all matters before the committee, which have not yet been acted on, including but not limited to; discovery motions, motions to clarify and motions to issue subpoenas.

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COMMITTEE RULING[S]

ISSUE 1.

HDPP's water treatment facilities are bigger than necessary for the power plant, and additional water will be treated by those facilities for non-HDPP purposes (Conditions 1e, 17(1), (19);

A. Condition 1(e) – Committee Ruling.

- Allegations in the Complaint concerning noncompliance with Condition of Certification 1e are dismissed *with prejudice*. During the certification proceeding, the Energy Commission considered and rejected Complainant's assertion that the 24-inch water pipeline is "oversized." The Commission Decision finds the "design capacity of the project pipelines is required to meet project needs." (Commission Decision at page 227.) Respondent complied with the Verification requirements of Condition 1e by submitting its final design drawings in a timely manner.

Complainant requests the full Commission review the dismissal. The committee disregarded the evidence presented not only by the Commissions own staff but by the Complainant. The Respondent has not to date submitted anything to the Commission that would come close to being considered "Final Design Drawings" by a prudent man[1] and in-fact the only drawing – a single line drawing or schematic, is found in Exhibit "L" to the Respondents Answer. For this single drawing to be considered the Respondents "Final Design Drawing[s]" for "the project's water supply facilities" - a multimillion dollar water treatment and distribution "system" stretches common sense to absurdity.[2]

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[1] Whether party **had notice of circumstances sufficient to put prudent man on inquiry** as to particular fact and whether by prosecuting inquiry he might have learned such fact are questions of fact, when facts are susceptible of opposing inferences. Schaefer v Berinstein (1956) 140 CA2d 278, 295 P2d 113; South v Wishard (1956) 146 CA2d 276, 303 P2d 805; Mills v Mills (1956) 147 CA2d 107, 305 P2d 61; Stevens v Marco (1956) 147 CA2d 357, 305 P2d 669; Harkins v Fielder (1957) 150 CA2d 528, 310 P2d 423; Ramey v General Petroleum Corp. (1959) 173 CA2d 386, 343 P2d 787; Schaefer v Berinstein (1960) 180 CA2d 107, 4 Cal Rptr 236; Helfer v Hubert (1962) 208 CA2d 22, 24 Cal Rptr 900.

[2] It is improper to single out certain testimonial facts and instruct that they spell negligence if prudent man would not have so conducted himself, vice being that it unduly emphasizes one portion of evidence, puts court in position of making argument to jury, and misleads jury into thinking that facts are

Even if the Committee wanted to consider and could make findings that "Exhibit "L" constitutes the final design drawings that the Respondent supplied and that these drawings were in fact the "Final Design Drawings" for the "project's water supply facilities". This single drawing and letter attachments prove that the water treatment plant – now under construction [by way of stipulation] is larger than that required for the power plant for the following reasons:

1. The Equipment Specified in Table 1 calls for a Pretreatment Water System of 6,900 Gallons per minute. This Pre-Treatment will provide flow to the cooling towers and to the Aquifer Banking System. The Pre-Treatment Portion of the Water Treatment Plant is now under construction with Equipment sized to process up to 11,000 acre-feet of water per year.
2. The Equipment specified in the Aquifer Banking System in what the Respondent refers to as the "Final Approved Plans" calls for an "Aquifer Banking System" of R/O treated water. This system is sized to treat and produce 2,160 Gallons per minute and if operated 24 hours a day 365 days a year would treat approximately 3,500 acre-feet of water per year. Far short of the proposed 4,000 acre-feet testified to in the hearings.
3. The Respondent's Final "Approved" Drawings demonstrate that the treatment system is an R/O Plant, which Respondent acknowledges is not the water treatment facilities that are presently being constructed and states that it has "CHANGED" the treatment facilities without requesting or receiving prior CEC approval.

Conclusion on Condition 1(e): The committee made an error in finding that the Water Supply Facilities are properly sized to meet only the HDPP needs. The Committee's error failing to allow for testimony and additional evidentiary materials to be submitted constitutes an abuse of discretion that HDPP is in compliance with the condition of approval. The Committee should have allowed the evidentiary hearings to proceed and testimony and evidence to be submitted and

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of undue importance or that court believes that to be true. Powell v Bartness (1956) 139 CA2d 394, 294 P2d 150.

cross-examination of the witness, prior to reaching summary conclusions not supported by either the record or the evidence. HDPP is out of compliance with Condition 1(e).

B. Condition 17(1) – Committee Ruling.

- "Allegations in the Complaint concerning noncompliance with Condition of Certification 17(1) are dismissed *subject to submittal of a signed codicil to the Aquifer Storage and Recovery Agreement (ASRA),* which would incorporate the final Conditions of Certification as adopted by the Energy Commission and would explain any discrepancies between the ASRA and the final Conditions. Respondent submitted the ASRA to the Commission in February 2000, when it was received into the evidentiary record as Exhibit 145. Complainant's assertion that the ASRA was not timely filed is contrary to the record."

The Committee again reaches a "Summary Conclusion" without making any finding of fact, just making a conclusionary statement. The record in this case is quite clear and is supported by the Memo attached to the complaint from Caryn Homes and Lorraine White. As Complainant has stated **SOIL&WATER – CONDITION 17,** requires **"[t]**he project owner shall enter into an Aquifer Storage and Recovery Agreement with the Victor Valley Water District (VVWD)", containing conditions to ensure that the water treatment plant would only be used for the HDPP's purposes. Although the HDPP CPM has provided monthly reports certifying that such a document exists as yet no such document has been supplied to the CPM, the record is devoid of such a document.[3]

As of July 6, 2001, at least two members of the CEC staff Lorraine White and Caryn Homes [4] believed that HDPP was out of compliance when they sent a memorandum to Steve Munro of the compliance division stating that Condition 17 had not been complied with.

"We raise two important issues regarding the materials submitted by HDPP, LLC on June 21, 2001. First, S&W 17, adopted in the Commission decision on

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3 LED EX "F" CPM Report to the Commission on Compliance

4 LED EX "B" Memo Lorraine White to Steve Monroe [Attached to Original Complaint]

May 3, 2000 approving the project, requires the project owner to enter into an Aquifer Storage and Recovery Agreement (ASRA) with the Victor Valley Water District (District). However, the ASRA contained in the project developer's most recent filing was signed by the project owner and the District on February 3, 2000. Although the ASRA does incorporate what are referred to as S&W 1, 4, 5, 6, 7, 17 and 18 by reference and has what are identified as S&W 1 - 18 attached to it, these are not the final the Conditions of Certification adopted in the Commission's decision. Moreover, the conditions attached to the ASRA filed in June are different than those attached the same document submitted for staff's review in May of this year. As a result, it is unclear what versions of the conditions were actually presented to and approved by the Board in February 2000. None-the-less, the fact remains that the district did not review and approve the same conditions ultimately approved by the Commission. In addition, the conditions attached to the ASRA are at points inconsistent and/or in conflict with the Energy Commission's final decision and its conditions of certification. **This means that the Commission's final conditions would likely be held by a court to not be part of the contract between the district and the project owner. {emphasis added}**

Complainant believes that it is uncontested that HDPP failed to timely provide the "**Verification:"** Wherein **"[t]**he project owner **shall** provide to the CEC CPM and CDFG a copy of a signed Aquifer Storage and Recovery Agreement with the terms described above **prior to commencing construction of the project."** Even as of the day of the Preheating Conference there was no signed Aquifer Storage and Recovery Agreement that complied with the terms of Condition 17.

HDPP's Answer asserts that there is an Agreement in place. Complainant disagreed based on the memo from staff and conversations with staff prior to filing of the complaint, a review of the files of both the SWRCB and CEC demonstrated there was no evidence that HDPP complied with Condition 17. As late as December 14th, 2001 the staff was still discussing this issue.[5] However, Complainant has been barred from discovery on this matter, with legal staff advising that notes from these meetings were "attorney client privilege".

[5] LED EX "G" Agenda Staff Meeting on Compliance December 14th 2001

Nevertheless, Complainant looks to the testimony in the record by Randy Hill[6], which was clear and concise that the VVWD contract had been nullified by a unanimous vote of the Board with the change in conditions. " . . . Directors voted unanimously to oppose the newly proposed changes to the conditions. **These conditions basically nullify our executed agreement with the High Desert Power Project."**

Because the final conditions were changed by the CEC, the "executed" contract between the High Desert Power Project and VVWD is "nullified". Mr. Hill goes on to express "serious doubt" about a "new agreement". "If these proposed conditions remain as they are, **I would have serious doubts about recommending my agency to enter into a new agreement with High Desert Power Project**.[7]

CEC Staff's Memo that a "new contract" – "approved by the VVWD", with all of the conditions embodied in it is a required condition acknowledged by the sworn testimony of Mr. Hill and Mr. Welch has not been complied with and as of this date the HDPP is out of compliance with the condition to supply an amended contract.

Alan Thompson amplified the situation when he questioned Mr. Welch. And with regard to the soils and water conditions contained in exhibit 146, . . . if those conditions were to be **adopted the aquifer storage and recovery agreement would have to be amended, if it could be**? Mr. Welch testified: **That's right, it would have to be amended again**.[8]

Thompson: Is it your understanding of the aquifer storage agreement that as it is currently written, as it currently stands, those water treatment facilities could be used for water injection aquifer replenishment, **but could not be used for domestic water supplies. Is that your understanding?** Mr. Welch testified: **"That is correct**. . . .**The facilities are not being designed to be used for domestic use**. And those are facilities that we intend to own.[9]

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6 RT 02-18-00 page 159 - JN

7 RT 02-18-00 PAGE 132-133 - JN

8 RT 02-18-00 Page 99 -JN

9 RT 02-18-00 page 101 - JN

Complainant asserts that the Committee's dismissal of the complaint, subject to a signed codicil, does not address the issue of non-compliance. The issue of whether HDPP was out of compliance on the date that construction started is a matter of fact, not a matter to be summarily dismissed. The Committee's ruling on this issue should have been, the Committee finds the allegation that HDPP was not in compliance with the Condition 17(1) on the date construction started to be true. The corrective action should be based on the evidence presented at the hearing, the evidence in the record and any additional testimony that may introduced. Finally a signed codicil that does not have the requisite approval from the VVWD Board of Directors or a letter from the requisite governing board of the LLC authorizing Mr. Welch to sign this important document as the Vice-President may also be unenforceable.

Conclusion: The Committee's ruling to "Dismiss", the complaint on this issue is an improper ruling or order and constitutes an abuse of discretion.

C. Condition 19 – Committee Ruling.

The committee ruled that compliance with condition 19 was dismissed without prejudice because the deadlines had not passed. However the Committee has constructive notice that HDPP and VVWD intend to violate the condition of approval. It actually appears that was the intent all along.

SOIL&WATER – CONDITION 19 Requires that the project owner **shall** limit any use of water treatment facilities by VVWD or another entity, for purposes other than providing water to the HDPP, to treating SWP water for injection into the regional aquifer. The project owner shall not allow VVWD or another entity to use the water treatment facility for treatment of water that is injected and then recovered by VVWD unless the Watermaster and VVWD have entered into a water storage agreement, and for which the appropriate lead agency has completed a CEQA review as required by MWA Ordinance 9. The project owner shall not enter into any contract or amend any existing contract to allow VVWD or another entity to use the water treatment facility for domestic purposes, unless the Energy Commission has approved an amendment to the project Decision allowing such use.

As of the filing of this complaint the one and only one application was filed by the VVWD for a Water Storage Agreement with the Watermaster. [10] This "Draft" is one that would allow for the injection and storage of 130,000 acre-feet of water cumulatively and up to 50,000 acre-feet in any one year. [11] Although the application was subsequently withdrawn, it is clearly the intent of VVWD to use the surplus capacity of the treatment plant for its own use.[12] The ASRA is clear on this, the application for a water storage agreement is also clear. While the commission determined it did not have to do a CEQA analysis on the probable surplus capacity use, it left to MWA that responsibility.[13]

Since VVWD has notified public agencies [CEC – SWRCB – Department of Health Services and the MWA] of its intent to use the treatment plant, a full and complete CEQA review of the full capacity of the Water Treatment Plant will be required of MWA, and or other agencies, prior to the approval of the water storage agreement.

Andy Welch testifies[14] that the reason for changing the Water Treatment Plant to Ultrafiltration "was based on the advise" of VVWD. Clearly the reason for the CHANGE in the Water Treatment is not something that was studied by the CEC and goes beyond the conditions imposed by the CEC. The reason for the CHANGE is so that VVWD can use the water treated for its own municipal purposes.

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10 LED EX "A" Draft Water Supply Agreement [Attached to Original Complaint]

11 Ibid.

12 LED EX "H" DHS Letter of September 19, 2001; "It was only recently that we became aware of your plans to use the stored water in the domestic water system."

13 DEC pg. 229 "JN " . . we realize that our Conditions do not resolve the broader water management issues within the region. ."

14 Exhibit "B" to Respondents answer.

CONCLUSION

The Complainant is entitled to conduct related discovery, have timely and complete replies to CPRA requests[15], have the evidentiary hearings on the matters complained of, and have rulings that are based on findings of fact and conclusions of law and not merely conclusionary statements. To summarily dismiss the complaint or portions thereof without the input of evidence and examination shows a callous disregard for the Public's conscious participation and is an abuse of discretion on the part of the Committee. The rulings fail to give the Public the opportunity to fully demonstrate the importance of the issues complained of. The Public has a right to ensure the Energy Commission enforces its own conditions as a means to restore Commission credibility and ensure the Public's Trust[16].

Respectfully Submitted: 1-23-02

/s/ Signed Original

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Gary A. Ledford
Real Party In Interest
Complainant and Petitioner
In Pro Per

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15 In considering the arguments of the parties, we are mindful of the legislative declaration that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (§ 6250.) [2] The adoption of CPRA reflected a " 'background of legislative impatience with secrecy in government' " (San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, 771-772 [192 Cal.Rptr. 415], quoting 53 Ops.Cal.Atty.Gen. 136, 143 (1970)) and courts must be careful to respect the purpose of the CPRA. We must give due regard to the primary purpose of CPRA, or what the United States Supreme Court has described as the "core purpose" of the analogous federal act: to " 'contribute significantly to public understanding of the operations or activities of the government' " and to let citizens know " 'what their government is up to.' " (U.S. Dept. of Justice v. Reporters Committee (1989) 489 U.S. 749, 773, 775 [103 L.Ed.2d 774, 795, 797, 109 S.Ct. 1468].) fn. 6 As our own Supreme Court has stated, "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (CBS, Inc. v. Block (1986) 42 Cal.3d 646, 651 [230 Cal.Rptr. 362, 725 P.2d 470].) City of Hemet v. Superior Court (Press-Enterprise Co.) (1995) 37 Cal.App.4th 1411 , 44 Cal.Rptr.2d 532

16 Mr. Ledford: "But again my point is . . . the Energy Commission going to shut this plant down?
Ms Bond: "That's what the conditions of certification require, correct"
Mr. O'Hagen: ". . .As a staff of the Commission, if these conditions are, in fact, adopted by the Commission, I would hope that we would enforce that."

Before the Energy Resources Conservation and Development Commission
OF THE STATE OF CALIFORNIA

COMPLAINT OF GARY LEDFORD ON HIGH DESERT POWER PROJECT WATER ISSUES	))))	**DOCKET NO. 97-AFC-1C (C1) PROOF OF SERVICE** ***[REVISED 12/04/01]***

I, **Gary Ledford** declare that on January 23, 2002, I deposited copies of the attached PETITION FOR REVIEW OF COMMITTEE RULINGS in the United States mail in Apple Valley, CA with first class postage thereon fully prepaid, and/or by Federal Express to the following:

DOCKET UNIT

The original signed document plus the required 12 copies to the Energy Commission Docket Unit:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 97-AFC-1 (C1)
Docket Unit, MS-4
1516 Ninth Street
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Individual copies of all documents to the parties:

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*Revisions to POS List, i.e. updates, additions6 and/or deletions

I declare that under penalty of perjury that the foregoing is true and correct.

/s/ Signed Original 1-23-02

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(Signature)

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